STATE OF MICHIGAN
SUPREME COURT

SANDRA M. KNUTH,

Plaintiff/Appellee,

Vs.

THOMAS E. KNUTH,

Defendant/Appellant.

Supreme Court #: 120526
Court of Appeals #: 231167
Macomb CC #: 98-002111-DM
Judge Peter J. Maceroni

_____/

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PLAINTIFF/APPELLEE'S RESPONSE TO DELAYED APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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PLAINTIFF/APPELLEE'S RESPONSE TO DELAYED APPLICATION FOR LEAVE TO APPEAL

I. Response to Statement of Judgments and Orders appealed from.

Plaintiff-Appellee acknowledges that Defendant-Appellant seeks leave to appeal from the December 3, 2002 Opinion and Order of the Court of Appeals, which affirmed the trial court's November 6, 2001 Judgment of Divorce. Plaintiff-Appellee asserts that the issues contained in Defendant-Appellant's Delayed Application lack merit, and do not present questions which should be reviewed by this Honorable Court.

Plaintiff-Appellee denies that Defendant-Appellant was denied due process and that the result was an unfair, inequitable property distribution. Defendant-Appellant did not raise the issue regarding the property distribution on appeal to the Court of Appeals. Furthermore, contrary to Defendant-Appellant's assertion that he was forced to represent himself without counsel, Plaintiff-Appellee asserts that Defendant-Appellant chose not to employ counsel to represent him at trial in this matter. Defendant-Appellant is a highly educated and intelligent individual. The decision of the Court of Appeals is not clearly erroneous and will not cause material injustice. Additionally, the decision of the Court of Appeals is not in conflict with a Supreme Court decision or another decision of the Court of Appeals. Defendant-Appellant's Delayed Application does not demonstrate that this matter should be considered by this Court pursuant to MCR 7.302 (B). Therefore, pursuant to MCR 7.302 (B), Defendant-Appellant's Delayed Application must be denied in its entirety.

It must be noted that the Affidavit Explaining Delay accompanying Defendant-Appellant's Delayed Application does not present a compelling excuse for Defendant-Appellant's delay. The Opinion of the Court of Appeals in this matter was issued on December 3, 2002. However, Defendant-Appellant failed to file his claim of appeal in a timely matter. Defendant-Appellant's counsel makes excuses for her client in the Affidavit Explaining Delay. However, by Defendant-Appellant's counsel's own admission, she and Defendant-Appellant were together on December 11, 2002, for an evidentiary hearing in this matter in the Macomb Circuit Court. Although Defendant-Appellant could have pursued his claim of appeal in a timely manner, he failed to do so.

Defendant-Appellant also filed a delayed application for leave to appeal from the July 19, 2001 decision of Court of Appeals, which dismissed Defendant-Appellant's claim of appeal for failure to pursue the matter. This Court remanded the matter to the Court of Appeals for reinstatement of the appeal. (SC docket number 120526). Defendant-Appellant has a history of delaying this matter. Again, Defendant-Appellant uses old excuses in order to pursue this matter, and his application is not timely.

Plaintiff-Appellee requests that the decision of the Court of Appeals be affirmed and that Defendant-Appellant's request for relief be denied in its entirety. If Defendant-Appellant's request for relief is granted, the result will be a miscarriage of justice, manifest injustice, and damaging to the parties' minor child.

II. Response to questions presented for review.

First, the decision of the Court of Appeals is not in direct, flagrant disregard of this Court's specific rulings, and the decision of the Court of Appeals must be affirmed. Contrary to Defendant-Appellant's assertions, the Court of Appeals and the trial court properly found subject matter jurisdiction. Both courts properly considered the applicable law regarding subject matter jurisdiction. The lower courts' rulings are not in direct, flagrant disregard of this Court's precedent.

Second, the decision of the Court of Appeals regarding the child custody dispute is not erroneous, and must be affirmed. Contrary to Defendant-Appellant's assertions, the lower courts did not hold that it is proper for a mother to abscond with a child and then establish "substantial connection" jurisdiction. Defendant-Appellant wrongfully contends that the trial court did not follow the procedures mandated under the UCCJA. Defendant-Appellant's assertions are completely inaccurate and untrue. Additionally, Defendant-Appellant wrongfully states that the Court of Appeals ignored the issue of violating the Parental Kidnapping Prevention Act.

Third, the Court of Appeals did not err when it held that Defendant-Appellant's denial of due process issue had "no merit." Review of the attached Appellee's Brief on Appeal and this Brief in Response to Application conclusively demonstrate that the decision of the Court of Appeals is not contrary to Supreme Court precedent. Additionally, contrary to Defendant-Appellant's assertion that the issue of subject matter jurisdiction involves legal principles of major

significance to the state's jurisprudence, directly affecting families and vulnerable young children, this case does not present an issue of major significance to the state's jurisprudence.

Furthermore, the Court of Appeals decision is not clearly erroneous and will not cause material injustice. Defendant-Appellant has filed his Delayed Application in an attempt to re-litigate the issues of this divorce case because he is unhappy with the results after the trial was held in this matter.

Therefore, Plaintiff-Appellee respectfully requests that this Honorable Court DENY Defendant-Appellant's application and request for substantive relief pursuant to MCR 7.302(F)(1), and award Plaintiff-Appellee attorney fees and costs for having to defend this action.

III. Statement of material proceedings and facts.

Plaintiff-Appellee hereby incorporates in its entirety, her record documented Statement of Facts contained in Appendix A, her appellate brief. Plaintiff-Appellee will also set forth her counter-statement of material proceedings and facts in response to Defendant-Appellant's statement of material proceedings and facts contained in his Delayed Application.

Contrary to Defendant-Appellant's assertion that this is an interstate divorce case and that the parties did not live in the State of Michigan during their marriage, the Plaintiff-Appellee asserts that she maintained the State of Michigan as her residence throughout the parties' marriage. Defendant further states that this matter involves substantial issues of jurisdiction under the UCCJA and the PKPA, however, these issues were appropriately handled by the lower courts,

which did not err in their respective holdings. Lastly, Defendant-Appellant has used the courts in the State of Michigan as well as the courts in the State of Tennessee in his attempts to control, dominate, and harass and annoy Plaintiff-Appellee. Defendant-Appellant, by his own choice, proceeded to trial in this matter without the assistance of counsel. Defendant-Appellant, as he argued in the lower courts, attempts to deflect his responsibility in deciding to proceed without counsel, by blaming anyone and everyone else for his own actions. During the time in which this matter was before the trial court, Defendant-Appellant admitted to earning one hundred and sixty-six thousand dollars ($166,000.00) in annual income the previous year, plus Defendant-Appellant admitted to earning a bonus of fifteen thousand dollars ($15,000.00) in July of 1999 (the month preceding the trial in this matter), and also to receiving twenty-five thousand dollars ($25,000.00) a few months prior to the trial date.

Prior to proceeding to trial, the trial court had adjourned the trial date two times previously at the request of Defendant-Appellant. Throughout the trial court's proceedings, Defendant-Appellant was represented by two different attorneys. Both of Defendant-Appellant's attorneys withdrew their representation, and the trial court provided Defendant-Appellant with time so that he was able to retain counsel if he desired to do so. Contrary to Defendant-Appellant's assertion that the trial court ordered a disbursement of five thousand dollars ($5,000.00) so Defendant-Appellant could retain counsel, Defendant-Appellant admitted that his understanding of the trial court's 7/7/1999 ruling was that the money disbursed to him was to be used to pay his child support

arrearage totaling four thousand and eight hundred dollars ($4,800.00). (T1, p 20, lines 5-11). Defendant-Appellant had the financial means to retain counsel, but chose not to do so prior to the trial date.

The trial court entered the Judgment of Divorce on November 6, 2000. Defendant-Appellant filed his claim of appeal. As indicated by Defendant-Appellant, he failed to file his Brief in a timely manner, although he filed his claim of appeal on November 27, 2000, and his Brief was due by May 30, 2001. As a matter of fact, Defendant-Appellant failed to file his Brief before July 19, 2001, when the Court of Appeals dismissed his claim of appeal.

The remaining chronological history of the proceedings in the lower courts in Defendant-Appellant's statement of material proceedings and facts in his Delayed Application are accurate. Defendant-Appellant's Delayed Application must be denied in its entirety.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY UPHELD THE TRIAL COURT'S FINDING OF SUBJECT MATTER JURISDICTION AND ITS FINDING IS CONSISTENT WITH MICHIGAN SUPREME COURT PRECEDENT AND MCL 552.9.

Plaintiff-Appellee hereby incorporates in its entirety, her argument regarding this issue as contained in Appendix A, beginning on page A-thirteen (A-13) of her appellate brief. Jurisdiction over divorce matters is statutory. Stamadianos v Stamadianos, 425 Mich 1, 8 (1986) (citations omitted). Michigan's statute regarding jurisdiction of divorce matters is MCL 552.9, which reads in relevant part:

> (1) A judgment of divorce shall not be granted by a court in this state in an action for divorce unless the complainant or defendant has resided in this state for 180 days immediately preceding the filing of the complaint and, . . . the complainant or defendant has resided in the county in which the complaint is filed for 10 days immediately preceding the filing of the complaint.

Defendant-Appellant argues in his Brief that this Court's case history requires actual residence, or physical residence in the State of Michigan in order to comply with residency requirements of the applicable statute. However, Defendant-Appellant's arguments must fail.

Defendant-Appellant cites Banfield v Banfield, 318 Mich 38 (1947), wherein this Court held that residence under MCL 552.9 means actual residence, not constructive residence. Banfield, supra. In Banfield, the plaintiff and defendant were married in London, England. Id. Plaintiff was a member of the British armed forces. Id. Defendant was a member of the United States army. Id. The parties lived in England until the defendant returned to the United States. Id. Plaintiff filed a complaint for divorce in Michigan, although she had never actually lived in Michigan. Id. Plaintiff claimed that by virtue of her marriage to defendant, who was a resident of Michigan, she too was a resident of Michigan. Id. This Court held that plaintiff could not claim constructive residence through her husband. Id.

This Court analyzed the applicable jurisdictional statute at the time. The applicable jurisdictional statute in the year 1947 addressed the issue of absence from the State of Michigan for a maximum time period of 90 days. Id. This statutory requirement was significant to the Court because the Court interpreted

the legislature's intent behind the statute as requiring the actual presence of a plaintiff in Michigan before the filing of a complaint. Id. "The reference to a possible absence not exceeding 90 days indicates rather conclusively that the legislature had in mind, in the enactment of the provision quoted, actual residence in Michigan. An analysis of all of the provisions of the section indicates clearly that the term 'residence' was used in the sense of an actual residence rather than a constructive one." Id., p 44.

Banfield is not analogous to the case at hand. In Banfield, the plaintiff never resided in Michigan. Apparently, she had never lived in the United States of America. Plaintiff was attempting to attain residency through her husband. Also, the statute in effect at the time required that a plaintiff actually physically live in Michigan prior to filing a complaint for divorce. The matter at hand is distinguishable from Banfield. First, Plaintiff-Appellee in the case at hand is not attempting to attain residency through Defendant-Appellant. She claims her own residency independent of Defendant-Appellant's residency status. Second, the applicable statute is different than the statute applied in Banfield. See MCL 552.9. Subsequent to this Court's decision in Banfiled, the legislature removed all language from the applicable jurisdictional statute implying that actual physical presence is required before a plaintiff may file a complaint for divorce in Michigan. Id. MCL 552.9 does not contain a requirement of actual physical presence. Id. Therefore, in the case at hand, it was appropriate for the lower courts to look at other factors, which establish residence.

The term "residence" includes in its definition "a thought of permanence, of a place to which one returns . . .." In re Scheyer's Estate, 336 Mich 645, 651-652 (1953). The intent of both of the parties to return to Michigan at the conclusion of Defendant-Appellant's military obligation substantiates the Plaintiff-Appellee's intent to return home to Michigan where she maintained her residence. Although Defendant-Appellant was not a resident of Michigan, Plaintiff-Appellee had maintained her Michigan residence during the parties' marriage and her intent throughout the marriage was to return to Michigan at the earliest date possible. Important evidence regarding Plaintiff-Appellee's intent is the trial testimony of Defendant-Appellant. During the trial, Defendant-Appellant admitted that throughout the parties' marriage, Plaintiff-Appellee stated that she intended to live in Michigan. (T2, p 262, lines 18-20). Plaintiff-Appellee indicated that her "roots" where she wants to be "physically, psychologically, emotionally, and personally" is in Michigan. (T3, p 353, lines 6-8). Another important fact, which speaks to the intent of both of the parties, is that both of the parties intended to return to Michigan when Defendant-Appellant completed his military service. (T2, p 266, lines 8-12; T3, p 353, lines 17-25). As a matter of fact, during the parties' marriage, Defendant-Appellant indicated that he was willing to change his residence to Michigan because Michigan is where Plaintiff-Appellee intended to live upon the conclusion of Defendant-Appellant's military service. (T3, p 353, lines 17-25).

Throughout the parties' marriage, Defendant-Appellant filed his income tax returns in Connecticut and claimed Connecticut as his state of residence. (Trial

Exhibit 1, Income Tax Return; MT, 7/27/1998, p 7, lines 7-12). Likewise, Plaintiff-Appellee maintained Michigan as her residence throughout the parties' marriage. Defendant-Appellant's argument that Plaintiff-Appellee's residence is where ever they happen to live due to his military commitment is contradictory to his own personal practice. Defendant-Appellant claims Connecticut as his residence and Plaintiff-Appellee claims Michigan as her residence, as evidenced by the facts of this case. A resident of Michigan who enters the armed services does not lose residency status because he or she is out of the state. McFadden v McFadden, 336 Mich 557 (1953). This rule can be applied to the spouse of a serviceperson where the spouse is out of the state due only to the military commitment of the serviceperson. Plaintiff-Appellee, although out of the State of Michigan due to Defendant-Appellant's military commitment, did not lose her Michigan residency because she was forced to move from state to state as Defendant-Appellant was relocated by the military. Plaintiff-Appellee intended to return to Michigan upon the conclusion of Defendant-Appellant's military obligation, and therefore, Plaintiff-Appellee maintained her Michigan residency. (See T2, p 266, lines 8-12; T3, p 353, lines 17-25; Plaintiff's 7/21/98 Affidavit).

In Hoffman v Hoffman, 155 Mich 328 (1909), this Court discussed the issue of determining residence. In Hoffman, the plaintiff wife was a Michigan resident. Id. Plaintiff married a man who was a resident of Illinois. Id. Reluctantly, plaintiff went to live with defendant in Illinois. Id. A short time later, plaintiff returned to Michigan and commenced divorce proceedings. Id. The Court held that when plaintiff left Michigan to live with her husband in Illinois, she

gave up her residence in Michigan. Id. The Court found no facts to indicate that plaintiff's intent was to remain a resident of Michigan.

In Leader v Leader, 73 Mich App 276 (1977), the Court of Appeals discussed the issue of residence using this Court's decision in Hoffman. The Court of Appeals gave the trial court's finding great weight because of the importance of fact finding as to plaintiff's intent. Leader, p 283. In Leader, plaintiff wife moved to Kentucky with her husband in an attempt to reconcile. Id., p 278. Plaintiff and defendant had lived in Michigan prior to their move. Id. Plaintiff wife testified that when they moved, she did not expect the reconciliation to work. Id. The trial court found that plaintiff's intent was to return to Michigan if the reconciliation was not successful. Id., p 278. This Court held that there were sufficient facts to uphold the trial court's finding that plaintiff was a resident of Michigan for purposes of jurisdiction. Id., p 283.

The Court of Appeals in Leader distinguished that case from Hoffman. The facts of the case at hand are analogous with the Leader case and distinguishable from the Hoffman case. The Affidavit of the Plaintiff-Appellee submitted to the trial court states that her intention has always been to keep the State of Michigan as her residence, and that she has not adopted Tennessee or any other state as her residence. (Plaintiff's 7/21/98 Answer to Motion for Dismissal By Summary Disposition Pursuant to MCR 2.116(C)(4)). The facts outlined in Plaintiff-Appellee's Affidavit support her position that she has always intended to resided in Michigan. (Id.) For example, Plaintiff-Appellee maintained

her Michigan voter's registration since 1992, and maintained her fitness club membership in Eastpointe, Michigan by paying annual dues since 1981. (Id.)

The Court of Appeals decision in this case must be affirmed. It is not contrary to this Court's precedent. The Court of Appeals held that the trial court did not err and found that the Michigan courts have jurisdiction over this matter. Defendant-Appellant's request for relief must be denied, and the decision of the Court of Appeals affirmed.

II. THE COURT OF APPEALS PROPERLY UPHELD THE TRIAL COURT'S FINDING THAT IT HAD JURISDICTION UNDER THE UNIFORM CHILD CUSTODY JURISDICTION ACT AND THE PARENTAL KIDNAPPING PREVENTION ACT.

Plaintiff-Appellee hereby incorporates in its entirety, her argument regarding this issue as contained in Appendix A, beginning on page A-twenty-four (A-24) of her appellate brief. Plaintiff-Appellee will respond to Defendant-Appellant's critique of the Court of Appeals decision as contained in Defendant-Appellant's Delayed Application Brief.

Defendant-Appellant claims that the Court of Appeals erred because its Opinion states, "the Tennessee court indicated its willingness to decline jurisdiction in the custody dispute." (Court of Appeals Opinion, p 2). Defendant-Appellant's claim is false. The trial court communicated with the Tennessee court regarding the issue of jurisdiction. (MT, 3/4/1999, p 9, lines 18-20; T1, p 15, lines 1-5; MT, 3/29/99, p 9, lines 8-11; MT, 5/3/99, p 7, lines 12-15; MT, 7/7/1999, p 27). Pursuant to the communication between the Tennessee and Michigan courts, the trial court determined that Michigan was the appropriate court to

assume jurisdiction and the Tennessee court agreed with the Michigan trial court. Id. Defendant-Appellant, in his relentless, controlling, and vindictive attempts to "win" this divorce matter at all costs, filed two (2) divorce actions in the State of Tennessee after Plaintiff-Appellee filed her Complaint for Divorce in Michigan. The Tennessee courts indicated their willingness to decline jurisdiction by agreeing that the Michigan trial court would proceed regarding this matter. Additionally, as admitted by Defendant-Appellant in his Brief on Appeal, Attachment A to his Delayed Application, page 11, note 1, the State of Tennessee, Davidson County Judge ordered that custody matters be concluded in Michigan. As indicated in Defendant-Appellant's argument, the State of Tennessee, Montgomery County Judge also deferred to the Michigan trial court. On March 4, 1999, the Defendant-Appellant acknowledged that the Tennessee court was deferring to the Michigan trial court. (MT 3/4/1999, p 6, lines 3-5). On August 25, 1999, the first day of trial, the trial court indicated that it had reviewed the jurisdictional issue, communicated with the Tennessee courts, and that the trial court would continue to exercise jurisdiction. (T1, p 15, lines 1-5).

It must be noted that Defendant-Appellant is merely attempting to gain what he perceives as "control" over the divorce and custody proceedings. This is evidenced by his attempt to file for divorce in two different counties in Tennessee, and his appeal of one of the cases to the Tennessee Court of Appeals and his request to appeal the other. (See Appendix A, Exhibit A and Exhibit B, attached thereto). One appeal in Tennessee has been dismissed and deemed frivolous. The second Tennessee case has been stayed pending the

outcome in the Michigan courts, and it is unknown if that matter has been dismissed. Meanwhile, Defendant-Appellant has moved to the State of Florida. The minor child, Alexander, born November 3, 1995, has resided in Michigan since May of 1998, and is now seven (7) years old. The best interests of the minor child will not be served if the trial court's finding of jurisdiction is vacated.

In Defendant-Appellant's Brief on Appeal, he contends that the Tennessee courts did not decline jurisdiction, but instead stayed the proceedings pending an outcome in the Michigan court. (Defendant's Brief on Appeal, pp 33-34). This is a misrepresentation of the facts. The Court of Appeals of Tennessee issued an Opinion and Order on or about May 5, 2001, affirming the dismissal of Defendant-Appellant's complaint filed in Davidson County, Tennessee, and finding the appeal frivolous. (See Apendix A, Plaintiff's Brief on Appeal, Exhibit A, Opinion and Order, Court of Appeals of Tennessee, 5/02/2001). According to an Order entered by the Montgomery County, Tennessee Court on September 25, 2001, the Defendant-Appellant's second case in Tennessee was stayed pending the decision of the Michigan Court of Appeals. (See Apendix A, Plaintiff's Brief on Appeal, Exhibit B, Order, 9/25/2001). Defendant-Appellant was granted the right to an immediate appeal of the above referenced Montgomery County Order, but as of the date of submission of Plaintiff-Appellee's Brief on Appeal, Defendant-Appellant had not pursued an appeal of said Order.

In light of the above facts and argument, the Court of Appeals did not err in determining that the Tennessee court indicated its willingness to decline jurisdiction in the custody dispute.

Defendant-Appellant next claims that the second error by the Court of Appeals is regarding the issue of "substantial connection" jurisdiction. The Defendant-Appellant contends that the Court of Appeals ruled that because a parent absconds with a child to this State, that the child has established "significant connections." This is completely untrue, and merely another false assertion. First, Plaintiff-Appellee did not "abscond" with the parties' minor child. Second, as outlined in Plaintiff-Appellee's Brief on Appeal, Appendix A, p A-27, attached hereto, the parties' minor child had and continues to have significant connections to the State of Michigan. The trial court and the Court of Appeals determined that the parties' minor child had his own independent significant connections with Michigan.

Defendant-Appellant argues that the minor child was not born in Michigan. This is true, but the minor child has significant connections with Michigan. The minor child was not born in Tennessee, which is where Defendant-Appellant wishes to pursue this matter. As incorporated herein, and discussed in detail in Plaintiff-Appellee's Brief on Appeal, attached hereto as Appendix A, p A-27, the parties' minor child has significant connections with Michigan. As such, the Court of Appeals properly affirmed the trial court's decision, and Defendant-Appellant's argument must fail.

Defendant-Appellant argues that the Court of Appeals did not address Defendant-Appellant's claim of violation of the Parental Kidnapping Prevention Act. This matter was addressed by both parties in their respective briefs on appeal. Defendant-Appellant presented this issue within the argument section regarding jurisdiction over the custody issues. The Opinion of the Court of Appeals clearly indicates that the trial court had subject matter jurisdiction over the custody dispute in this case. Therefore, the Court of Appeals considered the issue of subject matter jurisdiction, and affirmed the trial court.

Plaintiff-Appellee contends that Defendant-Appellant did not timely raise or preserve this issue for appeal, and without submitting to this Court that the issue of the Parental Kidnapping Prevention Act was preserved for appeal, which it was not, but for the sake of argument, Plaintiff-Appellee's arguments contained in her Brief on Appeal regarding this issue are incorporated herein in their entirety. (See Appendix A, Plaintiff's Brief on Appeal, beginning on p A-34). The Parental Kidnapping Prevention Act should not be applied in the matter at hand. Therefore, Defendant-Appellant's request to reverse the lower courts must be denied in its entirety.

III. THE COURT OF APPEALS PROPERLY FOUND THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT-APPELLANT AN ADJOURNMENT OF THE TRIAL DATE.

Plaintiff-Appellee hereby incorporates in its entirety, her argument regarding this issue as contained in Appendix A, beginning on page A-thirty-eight (A-38) of her appellate brief. (See Appendix A, Plaintiff's Brief on Appeal, p A-

38). Plaintiff-Appellee will respond to Defendant-Appellant's critique of the Court of Appeals decision as contained in Defendant-Appellant's Delayed Application Brief.

Defendant-Appellant claims that the Court of Appeals did not analyze this issue under recognized jurisprudence. This is not true. The Court of Appeals indicated that it found no abuse of discretion in the trial court's decision to deny another adjournment. (See Court of Appeals Opinion, p 2-3). The Court of Appeals cited Soumis v. Soumis, 218 Mich App 27, 32 (1996). In Soumis, the court indicated that this issue is reviewed for an abuse of discretion, and that the motion to adjourn the trial must be based upon good cause. The Soumis court also states that the trial court, in its discretion may grant the requested in order "to promote the cause of Justice." Id. Defendant-Appellant's claim that the Court of Appeals failed to analyze the issue under recognized jurisprudence is without merit.

This issue, as argued in Plaintiff-Appellee's Brief on Appeal, incorporated herein, was clearly decided correctly by the Court of Appeals. Under recognized jurisprudence, the trial court's decision was appropriately affirmed by the Court of Appeals. Contrary to Defendant-Appellant's assertion, he was not denied his due process rights. Defendant-Appellant systematically and maliciously attempted to control the divorce proceedings, delay said proceedings, and threatened Plaintiff-Appellee that he would spend every dime necessary to gain his objectives in this case. (See Plaintiff's Brief on Appeal, Statement of Facts, pp 8-12; MT, 7/7/1999, pp 20-21, lines 22-10, 19-24). Defendant-Appellant

contends that the reason he did not retain counsel was for lack of funds. However, Defendant-Appellant admitted to earning one hundred and sixty-six thousand dollars ($166,000.00) in 1998. (MT, 7/7/1999, p 4; T1, p 7, lines 4-12). It is important to note that Defendant-Appellant received a fifteen thousand dollar ($15,000.00) bonus check in July of 1999, (MT, 7/7/2002, pp 16-17, lines 19-2; T1, pp 38-39, lines 20-9), and Defendant-Appellant received twenty-five thousand dollars ($25,000.00) in February of 1999. (T1, p 41, lines 7-9). Additionally, Defendant-Appellant admitted on the date of the trial that he believed that the trial court's 7/7/1999 ruling ordered him to use the money disbursed to him to pay his child support arrearage totaling four thousand and eight hundred dollars ($4,800.00), as opposed to using said funds to retain counsel as Defendant-Appellant asserts in his Delayed Application. (T1, p 20, lines 5-11). Additionally, an Order was entered on July 23, 1999, allowing a disbursement of $5,000.00 to Defendant-Appellant. The decision of the Court of Appeals must be affirmed.

Defendant-Appellant's requested relief must be DENIED. The Judgment entered by the trial court in this matter is fair and equitable and to grant Defendant-Appellant a new trial would be unfair and result in manifest injustice to Plaintiff-Appellee, and damage to the parties' minor son.

CONCLUSION

For the reasons set forth above and as set forth in Plaintiff-Appellee's Brief on Appeal, incorporated herein, Plaintiff-Appellee prays that this Honorable Court will DENY Defendant-Appellant's Delayed Application in its entirety.

Respectfully Submitted:

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